court's and the Sixth Circuit court's method and reasoning used in granting summary judgment with regard to Count I seeking rescission and return of the premiums paid that require review by this Court. With regard to its motion for summary judgment as to Count I, PIIC conceded that there was a mistake as to the existence and insurability of the vehicles in question. PIIC also affirmed that at all times it presumed the vehicles existed (and therefore was mistaken as to the true facts of the existence and insurability of the vehicles). However, PIIC claimed that this mistake was not mutual. Specifically, PIIC asserted that the knowledge of the true facts giving rise to the mistakes in entering into the master insuring agreements and payment of premiums thereafter was imputed to BFM and LandOak through the principal of the independent contractor, Jeff Coppinger, hired by BFM and LandOak. Therefore, as PIIC argued, by operation of law, BFM and LandOak were not mistaken, and consequently there could be no rescission for mutual mistake.

As to the *one* issue raised by PIIC pertaining to Count I, the district court found in favor of BFM and LandOak. That is, the court found that the knowledge of Jeff Coppinger was not imputed to BFM and LandOak as a matter of law. However, by Order entered October 21, 2003, the district court, *sua sponte* and without notice, dismissed the case on a ground not raised in PIIC's motion or brief and which Petitioners had no opportunity to address. The district court concluded that while the parties were mutually mistaken as to the subject matter of the contract (i.e., existence and status of the vehicles to be insured), rescission for mutual mistake did not apply since "there was a meeting of the minds as far as the contract terms were concerned."

On Petitioners' appeal, the Sixth Circuit acknowledged that the district court should not have granted summary judgment against Petitioners *sua sponte* on an issue not raised

by PIIC and to which Petitioners had no opportunity to respond or address, and that the district court's substantive ruling was contrary to Tennessee law. Nevertheless, the Sixth Circuit affirmed the grant of summary judgment and dismissal finding that Petitioners were not prejudiced by the district court's action because, in the opinion of the court, Petitioners' legal arguments for rescission were without merit, although not for the reason set forth by the district court, but because the mistake of the parties was as to future acts.

The dissenting opinion found that both the majority opinion and the district court opinion were contrary to Tennessee law and that the grant of summary judgment should be reversed. 2004 WL 566712, at *5 (Rogers, Circuit Judge, dissenting). The dissent found that Tennessee law clearly required a refund of the insurance premiums when no risk ever attached, and that the existence of at least a genuine issue of material fact about whether the vehicles at issue ever existed, or were ever insurable, was not disputed. *Id.* The dissent explained that if the vehicles did not exist or were uninsurable for other reasons, PIIC did not incur the risk contemplated by the insurance policy, and if no risk attached, no premium was earned, and under Tennessee law, the premiums must be returned. *Id.* Accordingly, the dissent found that reversal was required by Tennessee law, which the court was bound to follow in the diversity case. *Id.* at **5-8.

ARGUMENT

THE GRANT OF SUMMARY JUDGMENT SUA SPONTE WITHOUT NOTICE ON AN ISSUE NOT RAISED BY THE MOVING PARTY IS FUNDAMENTALLY UNFAIR, INDEFENSIBLE JUDICIAL ACTIVISM AND CONSTITUTES PREJUDICIAL ERROR.

In this case, in affirming the district court's grant of summary judgment *sua sponte* without proper notice to the Petitioners, the Sixth Circuit ignored precedent from its own as well as other circuits and approved a procedure that deprives a party of his day in court without due process of law. The court then compounded the problem by failing to properly apply applicable Tennessee law in ruling against Petitioners.

This matter thus involves an important question of federal law involving the grant of summary judgment *sua sponte* on an issue not raised by the moving party without affording the opposing party a meaningful opportunity to respond and be heard on the issue considered by the court. Such procedure fails to comply with Fed. R. Civ. P. 56(c) and denies the losing party fundamental fairness. The Sixth Circuit has sanctioned this fundamentally flawed judicial procedure in this case and, further, has compounded the error by failing to follow applicable state law in this diversity case to the detriment of Petitioners. Moreover, the lower courts do not apply uniform procedures or standards of review when addressing the grant of summary judgment *sua sponte* without adequate notice to the opposing party. Given the importance of the summary judgment procedure in the federal courts and the danger of abuse when, whether due to judicial activism, a desire to speed cases along and clear court dockets, or some other improper reason, a party is unfairly denied his right to

a fair hearing on his claims by a district court's flawed and unfair procedure in granting summary judgment *sua sponte* without proper notice, and given the differing approaches used by the circuits in reviewing such action, this Court should exercise it supervisory power to address this fundamental and recurring problem.

Fed. R. Civ. P. 56 governs summary judgment. It provides for a summary judgment motion by a claimant, Rule 56(a), and by a defending party, Rule 56(b). The rule does not speak to summary judgment on the court's own motion. *See Powell v. United States*, 849 F.2d 1576 (5th Cir. 1988). The lower courts appear to have conflicting views about the propriety of granting summary judgment *sua sponte* and the standard of review to be used on appeal in reviewing *sua sponte* grants of summary judgment without proper notice. There is some authority for the proposition that a district court should not enter a summary judgment *sua sponte* against a party. *See, e.g., id.* at 1578 n.6. Most courts, however, allow the grant of summary judgment *sua sponte* providing, however, that the notice required by Rule 56(c) is afforded the opposing party. *See id.* (collecting cases).

The Supreme Court has stated that "district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the opposing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). However, the Supreme Court has never directly addressed the practice of granting summary judgment *sua sponte* on an issue not raised by the moving party and which the nonmoving party never had an opportunity to address.

With regard to notice, contrary to the Sixth Circuit's holding in this case, Sixth Circuit precedent holds that the opposing party at summary judgment not only *should* have an

opportunity to respond to all issues considered by the court, but Rule 56(c) "*mandates* that the party opposing summary judgment be afforded" such opportunity. *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989) (emphasis added). Of course, no such notice was afforded Petitioners in this case.

Where proper notice is not given, the circuits differ in the appropriate standard of review to be applied. Some circuits, such as the Sixth, hold that the grant of summary judgment without proper notice may be harmless error. *See, e.g., Routman v. Automatic Data Processing, Inc.; Powell v. United States*, 849 F.2d at 1580-81 (discussing various approaches taken by the circuits with regard to a harmless error analysis in such cases). As stated by the court in this case, the Sixth Circuit requires the nonmoving party to demonstrate prejudice to obtain relief on appeal in such a case. *Routman v. Automatic Data Processing, Inc.; see Yashon v. Gregory*, 737 F.2d 547 (6th Cir. 1984). "Noncompliance with the time [and notice] provision of the rule deprives the court of authority to grant summary judgment, . . . unless the opposing party has waived this requirement, . . . or there has been no prejudice to the opposing party by the court's failure to comply with this provision of the rule." *Routman v. Automatic Data Processing, Inc.*, 873 F.2d at 971 (quoting *Kistner v. Califano*, 579 F.2d 1004, 1005 (6th Cir. 1978) (citations omitted)). But prejudice is found in not having an opportunity to respond to the district court's proposed summary judgment, as was the case here. *Yashon v. Gregory; Kistner v. Califano; see Bennett v. City of Eastpointe*, 2005 WL 1384366 (6th Cir. 2005) (where district court granted summary judgment *sua sponte* to defendants on an issue not raised by defendants without notice to plaintiffs, district court abused its discretion in such procedural action and, thus, reversal and remand was required). Thus, the Sixth Circuit ignored its own precedent in finding no prejudice in this case.

Other circuits do not apply a harmless error analysis in such cases. *See, e.g., Stella v. Town of Tewksbury, Massachusetts*, 4 F.3d 53, 56 n.4 (1st Cir. 1993). As explained in *Stella*: "*Sua sponte* summary judgment is a remedy which, although available, must be handled with care. In this tricky area of law, an undue emphasis on speed is a surefire way to court reversal." *Id.* at 56. In *Stella*, the court reversed the district court's grant of summary judgment *sua sponte* without proper notice without addressing the merits of the substantive issues, explaining as follows:

> Although we understand defendants' entreaties that we turn a blind eye to procedural irregularities and focus instead on whether the presence of genuine issues of material fact can be discerned, we decline to delve into the substantive aspects of plaintiff's cause of action. Given the case's posture, leapfrogging to the merits would display much the same disregard for established protocol that marred the district court's performance. Courts cannot make up new rules as they go along, whether to promote notions of judicial economy or to suit a judge's fancy. Because the lower court employed a flawed procedural regime, we reverse its ruling, vacate the judgment, and reinstate the case for trial.

Id. at 55.

Similarly, in *Rogan v. Menino*, 175 F.3d 75, 80 (1st Cir. 1998), *cert. denied*, 528 U.S. 1062 (1999), the court stated: "[W]ithout advance notice of the basis of a looming dismissal, a targeted party lacks a 'meaningful opportunity to cull the best evidence supporting his position, and to present that evidence, together with developed legal argumentation, in

opposition to the entry of summary judgment.'" 175 F.3d at 80. Where "the summary judgment loser was never afforded such an opportunity, *sua sponte* summary judgment cannot stand." *Id.* Thus, in *Rogan*, the court reversed the grant of *sua sponte* summary judgment without notice without addressing the merits of the underlying substantive issue even though it was possible that doing so could result in the affirmance of summary judgment, because such assessment was "beside the point at this juncture. The issue here is one of process and fundamental fairness, not one of substance." *Id.* at 81 n.4.

In *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987), the court recognized the danger of granting summary judgment *sua sponte*, stating:

> Granting summary judgment sua sponte warrants special caution. Summary judgment may be granted by a district court "for a party without a motion, when the outcome is clear, so long as the opposing party has had an adequate opportunity to respond." . . . Indeed, we have held that "*sua sponte* dismissals without prior notice or an opportunity to be heard on the issues underlying the dismissal . . . 'generally may be considered hazardous.'" . . . This hazard exists due to the fact that *sua sponte* dismissals
>
> > . . . conflict with traditional adversarial concepts of justice to the extent that they make the district court 'a proponent rather than an independent entity.' . . . Second, such dismissals may ultimately waste, rather than economize, judicial resources, by producing appeals and remands that

> might have been avoided. . . . [and] Third, *sua sponte* dismissals may prejudice plaintiffs by depriving them of an opportunity to amend their complaints or to argue against the dismissal.
>
> . . . Viewed in this proper perspective, it is clear that dismissing Sawyer's complaint and granting summary judgment *sua sponte* in favor of the United States' counterclaim was in error.

(Citations omitted.) *See Verizon Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081 (9th Cir. 2004) (district court could not *sua sponte* grant summary judgment against defendant on defendant's counterclaims without giving defendant reasonable notice that sufficiency of its counterclaims would be in issue; accordingly, grant of summary judgment was reversed).

Contrary to the foregoing authority, and contrary to precedent in its own circuit, the Sixth Circuit opinion in this case ignored established procedures and fundamental fairness and affirmed the grant of summary judgment *sua sponte* against Petitioners without notice on an issue not raised by PIIC. To make matters worse, the district court's substantive ruling on the issue it addressed *sua sponte* was contrary to applicable Tennessee law. To further compound the unfairness to Petitioners, the Sixth Circuit sanctioned the district court's action and affirmed summary judgment and dismissal based on a substantive holding different from the district court's but one that, again, was contrary to applicable Tennessee law. Such an unjust outcome is the consequence of an indefensible brand of judicial activism that ignores established procedures and precedents to reach a desired

result. *See Rodriguez de Quijas v. Shearson American Express*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting) (noting majority conclusion that appellate court improperly declined to follow controlling precedent and calling such action by a lower court "an indefensible brand of judicial activism"; *City of Philadelphia v. Lead Industries Ass'n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993) (in a diversity case, "federal courts may not engage in judicial activism" when applying state law; the federal court's "role is to apply the current law of the appropriate jurisdiction, and leave it undisturbed."); *Civil Procedure*, 40 Wayne L. Rev. 389, 455 (1994) (referring to the practice of granting summary judgment *sua sponte* on issues not raised by the parties as "judicial activism").

This Court should not countenance such conduct by the lower courts. The Court, therefore, should take this opportunity to address a serious and recurring problem involving an important question of federal law and fundamental fairness on which the lower courts are in conflict and in need of guidance. Accordingly, it is respectfully requested that the Court grant this Petition.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request this Honorable Court to grant this Petition and issue a Writ of Certiorari to the Sixth Circuit Court of Appeals.

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No. _____

In The Supreme Court of the United States

BFM LEASING COMPANY, LLC;
LAND OAK LEASING, LLC,

Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

BFM LEASING COMPANY, LLC and LANDOAK LEASING, LLC	)	
Plaintiffs,	)	3-02-CV-714
V.	)	Phillips
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION

Defendant, Philadelphia Indemnity Insurance Company (Philadelphia), has moved for summary judgment [Doc. 12]. Plaintiffs, BFM Leasing, LLC and LandOak Leasing, LLC (BFM) have responded [Doc. 17].

BACKGROUND

Patrick Martin (Martin) and Mike Atkins (Atkins) were shareholders and served as officers for BFM.[1] In 1997, Martin and Atkins invested their own funds and recruited other business partners to fund an automobile leasing venture with the aid of Jeff Coppinger (Coppinger), President of Cherokee Rental, Inc. (Cherokee), an automobile leasing business

[1]Martin and Atkins are financial planners, who together own and operate Lanrick Group, Inc., which offers investment advice and advanced financial planning.

located in five locations in East Tennessee. BFM entered into an agreement with Coppinger, whereby Coppinger/Cherokee was to find leasing customers for BFM. Atkins and Martin would recruit capital and credit, which Coppinger would use to purchase cars to satisfy the needs of the leases. For each purchase, Coppinger was to submit a funding request for BFM's approval. The cars purchased by Coppinger were to be owned and titled in BFM's name. Cherokee was responsible for collecting all payments, fees and monies due under the leases and for forwarding all payments received to BFM. BFM would make profits from the business of leasing and Cherokee would be paid commissions in the amount of $750.00 on each lease and additional fees after a lease term and upon the sale of a leased vehicle based upon a residuary value of the vehicle at lease-end.[2]

In 1997, the parties entered into a written agreement (independent business agreement).[3] Plaintiffs claim that Cherokee was expressly the independent contractor of BFM, as the independent business agreement provided as follows:

> 9.1 Nothing contained in this Agreement shall be construed as creating an agency relationship between BFM and Cherokee. All actions of Cherokee are independent acts of Cherokee, unless such action is expressly and specifically approved in writing by BFM prior to such action occurring.

---

[2]At the end of the lease term, Cherokee was to sell the leased vehicle and forward all funds received to BFM.

[3]In 1999, LandOak was formed as a separate entity and began funding vehicles for Cherokee in an identical manner. No separate written agreement was ever executed between the parties.

Paragraph 10 notes

> This Agreement shall not be construed as creating a joint venture or partnership between BFM and Cherokee. All acts of the parties hereto are the independent acts by the respective parties unless otherwise previously agreed to in writing by the parties hereto.

Plaintiffs state they did not direct the manner in which Coppinger performed his work, pay his salary, oversee his daily operations, manage his affairs, or otherwise supervise, oversee, or advise him on when, where, or how to procure and manage vehicle leases. Plaintiffs contend they merely provided funding and paid Cherokee a fee for contract results.

Defendant argues the agreement on its face describes an agency relationship. Philadelphia contends Coppinger worked for the benefit of BFM by procuring leases in BFM's name and, upon approval of plaintiffs, purchasing vehicles registered to BFM. Defendant notes BFM controlled when funding requests were granted for the purchase of vehicles. Indeed, the record shows that BFM was to review all information and figures produced by Cherokee on each potential customer. No one was to become a lessee without the prior approval of BFM.

Once plaintiffs received a title application and supporting paperwork from Cherokee, BFM purchased from Philadelphia a residual value automobile insurance policy for each leased vehicle on a continual basis from 1997 through 2000. The insurance secured that the vehicle would not depreciate below an amount published in an agreed upon annual report. The policies stated the premiums were fully earned upon receipt and outlined the procedure for a proper tender under the policy.

At an undetermined point, Coppinger began creating fictitious leases and falsifying applications for certificates of title. After BFM provided funding for the bogus leases, Coppinger embezzled the funds. In many cases, the vehicles did not exist. On vehicles that did actually exist, Coppinger wrongfully titled the vehicles in the name of Cherokee instead of BFM or LandOak as required, and then gave use of those vehicles to Coppinger's family, friends, or otherwise placed them in Cherokee's rental fleet. Unaware of Coppinger's scheme, BFM continued to purchase insurance on the requested leases.

In late November 1999, BFM hired an accountant, Sharon Draper (Draper), to aid Coppinger in completing necessary paperwork, as certain certificates of title for which Coppinger had presented applications had not been received. On January 7, 2000, Coppinger confessed to his actions. Plaintiffs discovered that the source of the lease "payments" that had been collected for BFM by Cherokee was usually the funding provided by BFM to purchase vehicles.

In this action, BFM requests a refund of the premiums paid for cars which have not been physically located. Defendant asserts the insurance policies stated the premiums were fully earned upon receipt and non-refundable. Further, defendant argues a refund is not proper if the cars actually exist. According to Philadelphia, based on an investigator's report, there is reason to believe that some of the cars may exist, but Coppinger has disposed of them without traceable leases. Additionally, defendant asserts the premiums were earned because Philadelphia was at risk regardless of whether the cars existed.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if the evidence is such that a reasonable trier of fact could return a verdict for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are "material" only if establishment thereof might affect the outcome of the lawsuit under governing substantive law. *Anderson*, 477 U.S. at 248. A complete failure of proof concerning an essential element necessarily renders all other facts immaterial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). When reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. See *Matsushita Electric. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

MUTUAL MISTAKE

Plaintiffs allege a contract was never formed because of a mutual mistake between the parties. They claim two mutual mistakes occurred. The first alleged mutual mistake was that for some of the policies, plaintiffs paid insurance premiums on the same vehicle more than once. The second alleged mutual mistake occurred when plaintiffs paid premiums on vehicles that were not leased as reported. BFM asserts that by accepting the premiums, defendant thought it was insuring the vehicles owned by plaintiffs. Rather, insurance was purchased on vehicles that either never existed or were never leased as believed.

Philadelphia notes it had no knowledge of Coppinger's fraud, so defendant presumed the vehicles existed. Nonetheless, Philadelphia claims Coppinger's knowledge should be imputed to BFM, as Coppinger knew from the time the policies were issued that certain vehicles did not exist. Defendant argues, therefore, that the mistake was one-sided rather than mutual.

Plaintiffs note that in the event of a mutual mistake, a party may seek to rescind the contract and obtain a refund of the consideration paid. That is, the contract is voidable. *Warren v. Crockett*, 364 S.W.2d 459, 463 (1964). The remedy of mutual mistake is designed to ensure that there has been a meeting of the minds as to the material contract terms to which both parties intend to be bound and sufficient for adequate contract formation. Restatement of Contracts, § 154. The Tennessee courts have defined mistake as "an unconscious ignorance [or] forgetfulness of a fact, past or present, material to the contract, which exists in a legal sense where a person, acting upon some erroneous conviction of either law or fact, executes some instrument, does some act or omits to do some act which, but for the erroneous conviction, would not have been executed, done or omitted." *Bowater North America Corp. v. Murray Machinery, Inc.*, 773 F.2d 71, 75 (6thCir. 1985).

The court does not find the mutual mistake issue valid in this case as far as the contract formation. There was a meeting of the minds as far as the contract terms are concerned. The contract was not materially at variance with the mutual intention of the parties. The only mistake was plaintiffs not being cognizant of the fraud that began at some point during BFM's relationship with Coppinger. Thus, there is no genuine issue of material fact as to mutual mistake.

AGENCY/INDEPENDENT CONTRACTOR

An agency relationship arises when there is benefit and control. First, an agent carries on business for the benefit of a principal. *See Gehl Corp. v. Johnson*, 991 S.W.2d 246 (Tenn Ct. App. 1998). Second, a principal holds the ability to exercise control over the agent. When an agency relationship is created, an agent's knowledge is generally imputed to the principal. *Griffith Motors, Inc. v. C.E. Parker*, 663 S.W.2d 319, 322 (Tenn. Ct. App. 1982). An exception to the imputed knowledge rule is often called the "adverse interest" exception. An agent's knowledge is not imputed to his principal when "circumstances plainly indicat[e] that the agent would not advise his principal, as where the agent is known to be acting adversely to the principal, or where the third person seeking to charge the principal is in collusion with the agent." *DeFord v. National Life & Accident Ins. Co.*, 185 S.W. 2d 617, 620 (Tenn. 1945); *See Corim, Inc. v. Sam Blair Co.*, 721 S.W.2d 256, 259 (Tenn. App. 1986). However, a limitation to the adverse interest exception occurs "when the agent is acting as the sole representative of the principal in the transaction in question." *Bland v. Allstate Ins. Co.*, 944 S.W. 2d 372, 376 (Tenn. Ct. App. 1986).

Defendant asserts that Coppinger was an agent of BFM. According to Philadelphia, BFM had the ability to control Coppinger, as Coppinger could not receive funding until he supplied BFM with a factory invoice, application for title, and a signed lease. Defendant contends that Coppinger updated BFM on a weekly basis of the business affairs and that BFM hired an assistant (Draper), who was paid by BFM, to work directly for Coppinger. Martin has testified that Coppinger was the only person with whom he worked regarding BFM's transactions. No other person had the authority to enter into leases on behalf of BFM, except the principals, Atkins and Martin.

Plaintiffs argue that Coppinger, as president of Cherokee, operated a separate business for the exclusive benefit of Cherokee and that they had no right to control, manage, or direct the manner or actions of Coppinger. Before and during the contract work with BFM, Cherokee maintained a separate, wholly unrelated business of renting automobiles at numerous locations. As for defendant's reliance on the "sole representative" doctrine, plaintiffs contend that the Tennessee courts have noted the doctrine was not intended to apply "where an officer misappropriates a corporation's money." *Griffith Motors*, 663 S.W.2d at 323. In such cases as this, the exact relationship must be determined under the contract between the parties (BFM and Coppinger) and the facts of the particular case. *Carbide & Carbon Chem. Corp. v. Carson*, 192 Tenn. 150, 239 S.W.2d 27 (1951); *Youngblood v. Wall*, 815 S.W.2d 512 (Tenn. App. 1991). Relevant factors to consider are as follows:

> 1) Whether or not the one employed is engaged in a distinct occupation or business; 2) The kind of occupation with reference to whether in the locality the work is usually done under the direction of an employer or by a specialist without supervision; 3) The skill required in the particular occupation; 4) Whether the employer or workman supplies the instruments, tools and place of work of the person doing the work; 5) The length of time for which the person is employed; 6) Method of payment, whether by time or by job; 7) Whether or not the work is part of the regular business of the employer; 8) Whether or not the parties believe they are creating the relationship of master and servant; and 9) Whether the principal is or is not in business.

Henry v. United States, 452 F. Supp. 253, 254 (E.D. Tenn. 1978).

Under the facts of this case, if Coppinger had been an agent of plaintiffs, it cannot be said that he was acting as the sole representative of BFM. In the opinion of the court, the sole representative rule applies in situations where an agent conducts and approves the entire transaction, thus binding his principal. In this case, the plaintiffs had to approve funding requests and BFM, not Coppinger, actually purchased the insurance.

It is clear that Coppinger acted for his own interest and adverse to BFM's interests, used a position of trust and independence to defraud plaintiffs, and embezzled and misappropriated BEM's money and property. Even if Coppinger was found to be plaintiffs agent, the circumstances indicate that Coppinger benefitted from keeping the facts of his actions secret from plaintiffs. Therefore, given the fraud perpetrated on BFM, Coppinger's knowledge that he was falsifying applications and causing plaintiffs to apply for insurance on vehicles that did not exist or had not been leased would not be imputed to BFM as a matter of law.

Coppinger was employed in his own business and handled the business of his company in his own manner. He called upon customers when he chose to do so. BFM did not pay him a salary and he was not subject to the control of plaintiffs except as to the results of his work. The contract shows that the parties intended Coppinger to be an independent contractor. In the view of the court, Coppinger was an independent contractor.

IMPROPER TENDER

Defendant asserts the policy premiums were earned because Philadelphia was at risk regardless of whether the

cars existed. Plaintiffs contend that for whatever risk defendant assumed, it should have to pay the claims associated with the risk. However, defendant argues it is excused from paying any claims because BFM is incapable of making a "perfect tender."

The policies state the applicable procedure for making a proper tender. Under the MVP Settlement Option, tender means the delivery to Philadelphia of a copy of the title to the enrolled vehicle, together with copies of the relevant sales or lease contract and the factory invoice for the vehicle. The condition precedent to a loss claim requires the plaintiffs to make appropriate tender to defendant within 30 days of the scheduled termination date. Defendant, as its sole option, has the right to: (1) pay to BFM the Ultimate Net Loss and (2) purchase the vehicle for which a claim is being made, by payment to BFM of the MVP Value used to compute the Ultimate Net Loss. Defendant contends the documents required for tender are not unduly burdensome, and the time period allowed for tender is reasonable. However, BFM cannot comply with the tender requirements because of the fraud of Coppinger.

Plaintiffs argue that under the MVP Settlement Option, the value of the vehicles at lease-end ("Ultimate Net Loss") was to be computed as the Enrolled Residual Value minus the MVP Value. BFM notes the value is determined by reference to a trade publication. Thus, plaintiffs assert the requirement to provide titles and leases would not matter on calculating the payment on the risk. Plaintiffs state it would be a jury question as to whether the absence of titles and leases would be a material breach of contract sufficient to preclude payment of claims.

The insurance at issue here was not purchased to protect BFM from harmful business practices. Plaintiffs

clearly understood the terms "non-refundable and fully earned premium." Plaintiffs have not followed the procedure for making a "proper tender" under the policies. Significantly, a review of the policy language reveals that under the MVP Settlement Option, BFM was required to protect and preserve the right of defendant to purchase and take title to each insured vehicle. Clearly, plaintiffs may not recover under the insurance contracts. As there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law.

ORDER TO FOLLOW.

ENTER:

Thomas W. Phillips

Thomas W. Phillips
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

BFM LEASING COMPANY, LLC and LANDOAK LEASING, LLC	)	
Plaintiffs,	)	3-02-CV-714
V.	)	Phillips
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	)	
Defendant.	)	

JUDGMENT ORDER

For the reasons stated in the memorandum opinion filed contemporaneously with this order, defendant's motion for summary judgment [Doc. 12] is **GRANTED** and this case is **DISMISSED**.

ENTER:

Thomas W. Phillips
Thomas W. Phillips
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

PATRICIA L. MCNUTT, CLERK
BY _____
DEP. CLERK

Date 10/21/03
Order Book 194 Page 135

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

BFM LEASING COMPANY, LLC;
LANDOAK LEASING, LLC,

Plaintiffs-Appellants,

v.

PHILADELPHIA INDEMNITY
INSURANCE COMPANY,

Defendant-Appellee.

No. 03-6528
March 10, 2005
Rehearing Denied
April 4, 2005

BACKGROUND

Insured companies in the business of leasing automobiles sued an insurer, asserting claims for rescission or performance of a commercial insurance policy. The United States District Court for the Eastern District of Tennessee entered summary judgment for the insurer, and the insureds appealed.

HOLDINGS

The Court of Appeals, Ralph B. Guy, Circuit Judge, held that:

(1) there was no mutual mistake supporting rescission;

(2) uninsurable interest doctrine did not require rescission of the policy; and

(3) insureds' inability to provide documents required by the policy did not warrant requiring the insurer to pay. Affirmed.

Rogers, Circuit Judge, filed a dissenting opinion.

On Appeal from the United States District Court for the Eastern District of Tennessee.

Brian C. Quist, Jenkins & Jenkins, Knoxville, TN, for Plaintiffs-Appellants.

Walter W. Bussart, Lee B. Bowles, Bussart & Medley, Lewisburg, TN, for Defendant-Appellee.

Before GUY and ROGERS, Circuit Judges; DOWD, District Judge.*

RALPH B. GUY, Circuit Judge.

Plaintiffs, BFM Leasing Company, LLC, and LandOak Leasing, LLC, appeal from the district court's order granting defendant, Philadelphia Indemnity Insurance Company, summary judgment on plaintiffs' claims for rescission or performance of a commercial insurance policy. The district court ruled that it should not rescind the insurance contract based on mutual mistake and that it should not order defendant to perform because plaintiffs failed to properly tender its claims. We **AFFIRM.**

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*The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

I.

At the times relevant to this case, Jeff Coppinger was the president of Cherokee Rental, Inc. (Cherokee), which was in the business of renting and leasing automobiles in several cities in Eastern Tennessee. In 1997, Coppinger, on behalf of Cherokee, approached financial planners Michael Atkins and Patrick Martin with a business plan whereby Martin and Atkins would recruit capital and credit to purchase automobiles to lease to significant corporate accounts. BFM Leasing Company (BFM) was formed to carry out this plan. It was BFM's role to own the vehicles and Cherokee's role to recruit the customers, earning a commission on each new lease. Upon receiving certain paperwork from Coppinger, BFM would forward Coppinger funds to purchase certain vehicles. Coppinger would collect the lease payments from the customers and forward them to BFM. In March of 1997, BFM and Cherokee executed an Independent Business Agreement which formally defined their roles in the venture. In 1999, Martin and Atkins formed LandOak Leasing (LandOak) as a separate entity and began funding vehicles in the exact same way BFM had. While the parties never executed an agreement formalizing the relationship between LandOak and Cherokee, the parties intended the relationship to remain the same as it had been with BFM.

BFM purchased residual value insurance from Philadelphia Indemnity Insurance Company (PIIC) in 1997 and renewed it annually through August of 2000. Residual value insurance guarantees that the leased vehicles will have the expected residual value when they are returned at the end of a lease period. When BFM or LandOak received a title application and other paperwork from Coppinger, BFM would submit a vehicle enrollment application and premium check to PIIC. Over the course of the policy, BFM paid PIIC

$325,570.58 and LandOak paid $52,424.91. PIIC insured approximately 761 vehicles.

Martin and Atkins became suspicious that Coppinger was not correctly performing his duties when the state of Tennessee failed to return some titles. They sent an accountant to Coppinger's office to investigate, and soon after Coppinger confessed to perpetrating a fraud. Coppinger created fictitious title applications for vehicles he did not intend to purchase or for vehicles he did purchase but were titled to Cherokee and put to his own use. Coppinger collected funds from BFM to purchase the vehicles, and then used part of those funds to make the monthly lease payments. It is unclear when Coppinger began the scam; however, plaintiffs submitted to the district court a private investigator's report showing that some of the leases were legitimate. Also, Martin testified that "probably in the first year or two he was probably doing some leasing."

When BFM and LandOak informed PIIC that the enrolled vehicles were never leased as believed (and therefore not insurable), BFM and LandOak asked PIIC to return their premiums. PIIC refused. BFM and LandOak then submitted applications for benefits, but PIIC never responded. BFM and LandOak then filed suit seeking either rescission of the insurance contract and a full refund of all the premiums, or in the alternative seeking benefits from PIIC on the applications previously submitted. The district court granted PIIC summary judgment on both claims. It first found that BFM and LandOak were not entitled to rescind the contract based on mutual mistake because there was no mistake as to the terms of the contract. The court further held that PIIC did not have to pay benefits because BFM and LandOak did not (and could not) provide the documents required under the contract before PIIC was required to pay benefits and, further, the contract was not intended to insure against the type of loss

incurred by BFM and LandOak. BFM and LandOak appeal, arguing that the district court erred in concluding that mistakes as to underlying material facts of a contract (as opposed to mistakes as to contract terms) are not grounds for rescission.

II.

We review *de novo* the district court's grant of summary judgment. *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed.2d 538 (1986).

A. Count One: Rescission of the Insurance Contract

Under Tennessee law, a contract may be rescinded if there is a mutual mistake. *Warren v. Crockett*, 211 Tenn. 173, 364 S.W.2d 352, 355 (1962). A "mistake" is "an unconscious ignorance [or] forgetfulness of a fact, past or present, material to the contract, which exists in a legal sense where a person, acting upon some erroneous conviction either of law or fact, executes some instrument, does some act or omits to do some act which, but for the erroneous conviction, would not have been executed, done or omitted." *Bowater N. Am. Corp. v. Murray Mach., Inc.*, 773 F.2d 71, 75 (6th Cir. 1985). "[T]he mistake must relate to a past or present fact, not an opinion as to the result of the known fact." *Metro. Life Ins. Co. v. Humphrey*, 167 Tenn. 421, 70 S.W.2d 361, 362 (1934).

At summary judgment, the parties treated the mistake issue solely in terms of whether Coppinger was BFM's agent and, therefore, whether his knowledge of his fraud should be imputed to BFM. The district court rejected defendant's agency theory,[1] but went on *sua sponte* to initiate the discussion of whether a mutual mistake occurred even though the parties agreed to the terms of the contract. BFM and LandOak argue that the district court erred when it decided there was no mutual mistake here because there was "a meeting of the minds as far as the contract terms are concerned." They assert that even though the parties agreed to the terms of the contract, both parties suffered from a mistake of fact; namely, that there would be insurable cars.

Plaintiffs are correct that a mutual mistake of a material past or present fact may be grounds for rescission. *Id.* The district court erred insofar as it held that mistakes must go to the understanding of the terms of a contract and cannot be material facts underlying the contract. Nevertheless, there was no mutual mistake here because there was no mistake of material fact when the parties negotiated the policy. The parties mistakenly enrolled noninsurable cars after they formed the contract. Put another way, at the time the parties formed the contract, they were not mistaken as to a present fact. Rather, they mistakenly predicted future facts. Such a mistake is not grounds for rescission under Tennessee law. *Id.*

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[1]The district court was correct that Coppinger's knowledge of the fraud should not be imputed to BFM and LandOak because "where the agent is dealing with the principal in his own interests or where his interests are adverse to that of the principal so that it is to his own advantage not to impart his knowledge to the principal," the principal will not be charged with the knowledge of the agent. *Griffith Motors, Inc. v. C.E. Parker*, 633 S.W.2d 319, 322 (Tenn. Ct. App. 1982).

Young America, Inc. v. Union Central Life Insurance Co., 101 F.3d 546 (8th Cir. 1996), does not persuade us to reach a different result. There, a business purchased life insurance policies for its officers. *Id.* at 547. The policy was governed by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1994) (ERISA). *Id.* When the Chief Executive Officer died, the insurance company refused to pay benefits because he was not a full-time employee, as the policy required. *Id.* The business asked the insurance company to return all of its premiums since it was paying under the mistaken notion that certain part-time employees were covered by the policy, but the insurance company refused. *Id.* at 548. The business sued, and the district court granted it summary judgment, holding that the business was entitled to recover the premiums pursuant to ERISA federal common law. *Id.* The Eighth Circuit agreed that federal common law provided an action for restitution of mistakenly made payments to an ERISA plan. *Id.* The court further concluded that the district court was right to order restitution of the mistakenly made payments. *Id.* Since it appeared that at some point during the life of the policy the officers in question did work full time, the case was remanded to the district court for determination of how many payments were made in error. *Id.* at 548-49.

Young America was decided under ERISA common law, which does not govern this case. Furthermore, the plaintiffs in *Young America* sought restitution of improperly made payments, not rescission of the entire contract based on a mistake at the formation of the contract.

BFM and LandOak also argue for the first time on appeal that Tennessee's "uninsurable interest" doctrine requires the court to rescind the insurance contract. Tennessee law provides "where a policy of insurance had been issued to one having no insurable interest therein, the policy is void,

and ordinarily the person paying the premiums thereon can recover the same from the insurer." *Vinson v. Mills*, 530 S.W.2d 761, 763 (Tenn. 1975). Otherwise, the contract is essentially a wager and a violation of public policy. *Duncan v. State Farm Fire & Cas. Co.*, 587 S.W.2d 375, 376 (Tenn. 1979).

This court normally does not entertain arguments that parties make for the first time on appeal. *See, e.g., United States v. Ninety-Three Firearms*, 330 F.3d 414, 424 (6th Cir. 2003). In this case, however, the district court decided the mutual mistake issue on a theory it applied to the case *sua sponte*, to which BFM and LandOak were not able to respond, and to which BFM and LandOak arguably would have presented this "uninsurable interest" argument in response. At summary judgment, the opposing party should have an opportunity to respond to all issues considered by the court. *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989). If *sua sponte* summary judgment is improperly granted, the losing party must show prejudice. *Harrington v. Vandalia-Butler Bd. of Educ.*, 649 F.2d 434, 436 (6th Cir. 1981). For the reasons explained below, even if plaintiffs had argued this issue in the district court it would have been unsuccessful, and therefore they suffered no prejudice.

In *Vinson*, the son of the owner of real property took out an insurance policy on the property. 530 S.W.2d at 763.[2] The insurance agent advanced the first premium, and when the son did not pay him back the agent sued to recover the advanced premium. *Id.* at 762. The defendant argued that he had no insurable interest in the property, and therefore the policy was void. *Id.* at 763. The Tennessee Supreme Court disagreed, holding that there was an insurable interest

[2]The insurance policy included coverage for personal injury and property damage as well as comprehensive hazard insurance to the buildings and personal property.

because the policy was issued to the holder of the mortgage, and the mortgage holder did have a valid insurable interest in the policy. *Id.*

In *Duncan,* the plaintiff purchased a tractor-trailer rig and also purchased a collision insurance policy from the defendant insurance company. 587 S.W.2d at 375. After the tractor was destroyed in a single-vehicle collision, the plaintiff filed a claim for the loss with the defendant insurance company. *Id.* The insurance company refused to pay the claim because the tractor had been stolen before the plaintiff purchased it, and the insurance company therefore believed the plaintiff had no insurable interest in the tractor. *Id.* The court first held that "one has an insurable interest in property if by its continued existence he will gain an advantage, or if by its damage or destruction he will suffer a loss, whether or not he has any title in, lien upon or possession of the property." *Id.* at 376. Applying that principle to a good faith purchaser of a stolen vehicle, the court held that the purchaser does have an insurable interest because the purchaser benefits from the continued use of the vehicle, and as a constructive bailee of the vehicle he may be liable to the true owner if the true owner demands its return but the good faith purchaser is unable to return it because it is destroyed. *Id. See also Oliver v. Johnson,* 692 S.W.2d 855, 857 (Tenn. Ct. App. 1985) (holding that the plaintiff had an insurable interest in real property); *Brewer v. Vanguard Ins. Co.,* 614 S.W.2d 360, 364 (Tenn. Ct. App. 1980) (holding that the plaintiff had an insurable interest in her dwelling).

The critical question is what was the interest that plaintiffs insured. Unlike the cases discussed above, here the plaintiffs did not insure a thing, but rather insured against a contingent event--the residual value of the used cars being lower than the parties predicted. Plaintiffs did have an interest in that event not occurring as the success of their

investment in the leases (some of which appear to have been legitimate) depended on the residual value of the vehicles at the leases' end. To have an insurable interest, it does not have to be a certainty that plaintiffs would sustain economic injury from the loss of the property, it is "sufficient that loss of the property might subject the insured to such injury." *Duncan*, 587 S.W.2d at 376. Plaintiffs had an insurable interest in the contingent event even if ultimately they could not collect on their claims because, when the time came, they lacked the proper documents.

B. Count Two: Payment of Claims

As to BFM and LandOak's claim for benefits under the insurance policy, BFM and LandOak contend the district court erred in finding that PIIC was not required to pay benefits because it was impossible for BFM and LandOak to submit the paperwork necessary for claim as provided by the contract. The "MVP Settlement Endorsement Option" provides that to make a claim, plaintiffs must tender to PIIC a copy of the title to the enrolled vehicle, together with copies of the relevant sales or lease contract and the factory invoice for the vehicle. Plaintiffs argue that since PIIC was to calculate the lease-end value of the vehicle by reference to a trade publication, the requirement for them to provide actual titles and lease agreements would not preclude PIIC from calculating and paying the claims. Where, as in this case, the insured cannot provide any of the documents the policy requires before the insurer pays benefits, the insurer should not be forced to pay out on the claims. The district court correctly granted PIIC summary judgment on this claim.

AFFIRMED.

ROGERS, Circuit Judge, dissenting.

Tennessee law clearly requires a refund of insurance premiums when no risk ever attached. The law is reflected in an 1891 Tennessee Supreme Court case that has never been overruled and that is consistent with general insurance law. *James v. Insurance Co. of North America*, 90 Tenn. 604, 18 S.W. 260, 260 (1891). The case and its principle are the primary argument of the plaintiffs on appeal, yet the case is only cited in the defendant's brief for another proposition, which simply disregards the argument. As a federal court sitting in diversity, we are bound to follow applicable state law, in this case Tennessee law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Reversal is required by that law in this case.

The existence of at least a genuine issue of material fact about whether the vehicles at issue ever existed, or were ever insurable, is not disputed. If the vehicles did not exist or were uninsurable for other reasons, PIIC did not incur the risk contemplated by the insurance policy--i.e. that the cars would have depreciated below a certain value by the end of the lease. If no risk attached under a contract of insurance, no premium is earned, and under Tennessee law, premiums must be returned.

In *James*, the Supreme Court of Tennessee considered an insurance policy by which the insurer purported to assumed the risk of fire to certain lumber. *James*, 18 S.W. at 260. The policy contained a warranty stating that a space of 150 feet existed between the insured lumber and a nearby mill. *Id.* However, at the time the contract was entered, a space of 150 feet between the lumber and the mill did not exist. *Id.* Because the conditions necessary to make the contract effectual were never satisfied, the court found that no risk had attached to the insurer and accordingly, that the insured was entitled to a return of his premium. *Id.* The court explained that "[t]he contract of insurance is a conditional one. If no risk

attaches, no premium, in the absence of fraud, is earned. When the risk never attached, and no risk was ever run, the premium is to be returned in case it has been paid, and the assured was guilty of no fraud. May on Ins. § 4." *Id.*[3] *James* has been followed by the Tennessee Court of Appeals in *Interstate Life & Accident Co. v. Cook*, 19 Tenn. App. 290, 86 S.W.2d 887, 890-91 (1935).

The *James* principle moreover appears fully consistent with general insurance law. Insurance is a contract whereby insurance premiums are paid to an insurer in return for the insurer's assumption of the risk. *See* 28 Williston on Contracts § 70:255. However, "[w]here the risk has not attached or where no part of the interest insured is exposed to any of the perils insured against, the insurer, in the absence of any fault or fraud on the part of the insured, has no claim to the premium, and must return it." 5 Couch on Ins. § 79:8; *see also* 28 Williston on Contracts § 70:255 ("if no risk attaches, the premium may be recovered"); 14 Williston on Contracts § 41:21 ("where the risk never attaches, the reason for requiring a surrender of the premium by insurer is apparent"). A comprehensive annotation published in 1940 cites cases from 23 American jurisdictions indicating that, absent fraud, premiums are to be returned where the insurance policy was void, even though the contract was not contrary to public policy. 129 A.L.R. 57, 60-63 (1940).

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[3]The cited treatise explains as follows: [Insurance is] "a conditional contract; for when no risk attaches no premium is to be paid, or, if paid, must, in the absence of fraud, be returned to the assured. In point of fact, the contract is to pay the premium on condition that the risk is run. . . ." John Wilder May, THE LAW OF INSURANCE § 4, at 3-4 (1873) (footnote omitted).

A relatively recent North Carolina case applied this law in circumstances very similar to those of the present case. *Latta v. Farmers County Mutual Fire Ins. Co.*, 67 N.C. App. 494, 313 S.E.2d 214 (1984). In *Latta*, the plaintiff sought to recover premiums paid to an insurance company for crop insurance. No risk had ever attached under the policy because, at the time the plaintiff entered into the contract for insurance, the plaintiff had Federal Crop Insurance and, unbeknownst to the plaintiff, a clause in the insurance contract suspended coverage in the event the insured has or obtains Federal Crop Insurance. *Id.* at 215. The court found it inapposite that the defendant was at all times "'ready, able and willing' to perform, provided the plaintiff complied with the terms of the agreement," because the insurance company was never at risk under the policy. The court stated that "[i]t is an established principle of insurance law that an insurer must return premiums where, without fault or fraud by the insured, no risk to the insurer ever attaches under the policy. *Id.* at 216. In such a case, the premiums have been paid upon a consideration which has failed." *Id.* at 215-216. Therefore, the court found the plaintiff was entitled to a return of the premiums paid. *Id.* at 216.

It follows inexorably that BFM and LandOak are entitled under Tennessee law to a return of premiums paid because PIIC was never at risk under the insurance contract. The policy at issue in this case was for residual value insurance. Residual value insurance insures that, at the end of a long-term lease, the insured automobile will have a certain value. However, BFM and LandOak have established a genuine question of fact about whether the cars purportedly enrolled under the insurance policy ever existed or were leased in accordance with the eligibility requirements of the policy. If the cars never existed or did not meet the eligibility requirements of the policy, PIIC did not incur the risk contemplated by the parties--that the cars would be worth less

than a specified amount--because the cars were never actually insurable. The district court and the majority opinion both agree that BFM and LandOak were innocent of any fraud in the situation.[4] The grant of summary judgment should therefore be reversed.

It is true that *James* does not appear to have been cited by plaintiffs to the district court. The complaint did state, however, that "Defendant incurred no risk of loss," J.A. 8, that the contract was "void initiato [sic]," and that plaintiffs are "entitled to a refund of [the] premiums." J.A. 9. While these allegations were made in the context of "mutual mistake," they nonetheless sufficiently plead a claim that the premiums should be returned on the *James* principle. *See Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) ("legal theories of recovery need not be spelled out as long as the relevant issues are sufficiently implicated in the pleadings"). The summary judgment motion papers did not treat the question of whether, assuming plaintiffs had no knowledge that the automobiles did not exist, the premiums should be refunded. Instead, the summary judgment motions dealt with whether such knowledge should have been attributed to the plaintiffs. See majority opinion at fn. 1. With regard to the claim for refund of premiums, defendant's memorandum in support of summary judgment was based entirely on the argument that "there was no mutual mistake because BFM Leasing knew, through their agent's knowledge, that the cars did not exist at the time the policies were issued." J.A. 35, 37-38. The district court ruled *against* defendant on this issue, but ruled in favor of defendant on another basis--one that, it turns out, was

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[4]Both the district court and the majority opinion agree that the perpetrator of the fraud, Jeff Coppinger, was an independent contractor of BFM and LandOak. Accordingly, Coppinger's fraud is not properly imputed to BFM and LandOak.

contrary to Tennessee law. Where summary judgment is granted on an unanticipated legal theory, it makes little sense to prevent a party from refuting the theory for the first time on appeal. *See Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989) (noting that the party opposing summary judgment must have "a reasonable opportunity to respond to all issues to be considered by the court").

Moreover, the fact that plaintiffs on appeal cited some cases involving insurance contracts that were void as against public policy should not be construed to limit plaintiffs' argument to cases regarding "insurable interest." The *James* principle is broader: if no risk attached, premiums must be refunded, absent fraud. It does not matter whether risk did not attach because of the lack of insurable interest, as was argued in *Vinson*, or because it was impossible for the insured event to occur, as in this case and as in *James*.[5]

It should make no difference whether the *James* principle is based on a theory of lack of consideration, or on a theory of mutual mistake.[6] Whichever theory the principle is based on, it is controlling here. Even assuming, however, that plaintiffs are limited to a theory of mutual mistake, the plaintiffs should succeed. The plaintiffs have demonstrated a mutual mistake of the parties about a material fact underlying the contract--the existence or insurability of the cars. It is no answer that the parties were not, at the time they formed the contract, mistaken as to a present fact. Contract formation

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[5]Indeed, in a case arising out of Tennessee this court specifically read the *James* principle to be applicable where "the contract was not against law or public morals." *Georgia Home Ins. Co. v. Rosenfield*, 95 F. 358, 363 (6th Cir. 1899). *See also* Annotation, 129 A.L.R. 57, 60-63 (1940).

[6]It appears to be the former. See n. 1, *supra*.

often involves a master agreement and subsequent implementing agreements. *See Gregg v. Transportation Workers of America International*, 343 F.3d 833 (6th Cir. 2003) (life insurance); *Beynon v. Garden Grove Medical Group*, 100 Cal. App. 3d 698, 161 Cal. Rptr. 146 (Cal. Ct. App. 1980) (health insurance). The master agreement in this case provided insurance only with respect to "Enrolled Vehicles," and a vehicle was enrolled only following the submission of an Enrollment Form, in duplicate, along with a corresponding premium payment, plus acceptance and certification by the insurance company of the Enrollment Form. J.A. 67-68. Nothing about the *James* principle applies with less force when insurance contracts are structured in this way. At some point the mutual obligations of premium payment and risk undertaking ostensibly went into force (presumably when the Enrollment Form was accepted). At that point, with respect to cars that did not exist or were not otherwise insurable, no risk attached. At that point the *James* principle accordingly required a return of premiums.

Of course, public policy may not support the *James* rule. Insurance companies may incur unnecessary costs of administration, and may have to maintain unnecessary reserves or buy unnecessary reinsurance as a result of risk that the insurance companies reasonably believe to exist. Sound policy may suggest that this cost should be borne by the insured, by allowing the insurance company to keep the premiums, since the insured is in a better position than the insurance company to know whether the risk has attached. We are however nonetheless bound by Tennessee law, which is clearly to the contrary.

Accordingly, I respectfully dissent.

FILED
APR - 4 2005
LEONARD GREEN, Clerk

Case No. 03-6528

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

BFM LEASING COMPANY, LLC;
LANDOAK LEASING, LLC

Plaintiffs - Appellants

v.

PHILADELPHIA INDEMNITY
INSURANCE COMPANY

Defendant - Appellee

BEFORE: GUY, ROGERS, Circuit Judges and DOWD, District Judge*

Upon consideration of the petition for rehearing filed by the appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, DENIED. Judges Guy and Dowd adhere to the majority opinion and Judge Rogers adheres to his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk

*The Honorable David D. Dowd, United States District Judge for the Northern District of Ohio, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BFM LEASING COMPANY, LLC and LANDOAK LEASING, LLC,	)	
Plaintiff,	)	NO. 3:02-CV-714
VERSUS	)	
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant, by and through counsel, pursuant to Federal Rule of Civil Procedure 56 and requests this Court grant summary judgment in its favor for the reasons set forth in the attached Deposition of Patrick Martin, Statement of Undisputed Facts, and the Memorandum of Law in Support hereof.

This 25th day of June, 2003

Respectfully submitted,

BUSSART & MEDLEY

By *Lee Bussart Bowles*

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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of July, 2003, mailed by United States mail with first-class postage prepaid, a true and accurate copy of the foregoing to **Brian C. Quist, Esq.**, Jenkins & Jenkins Attorneys, PLLC, 2121 First Tennessee Plaza, 800 S. Gay Street, Knoxville, TN 37929-2121

Lee Bussart Bowles
LEE BUSSART BOWLES

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BFM LEASING COMPANY, LLC and LANDOAK LEASING, LLC,	)	
Plaintiff,	)	NO. 3:02-CV-714
VERSUS	)	
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	)	
Defendants.	)	

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Comes now the Defendant, Philadelphia Insurance Company, pursuant to Federal Rule of Civil Procedure 56 and requests this Court grants its Motion for Summary Judgement for the reasons set forth below:

FACTS

The parties in this action are Plaintiffs, BFM Leasing, LLC and LandOak Leasing, LLC (hereinafter "BFM Leasing") and Defendant, Philadelphia Insurance Company (hereinafter "Philadelphia"). Patrick Martin and Mike Atkins were shareholders and served as officers for BFM Leasing and LandOak Leasing. Mr. Martin and Mr. Atkins are well qualified financial planners. Together they own and operate Lanrick Group, Inc., which offers investment advice and advanced financial planning. Mr. Martin and Mr. Atkins invested their own funds and recruited other business

partners to fund a automobile leasing venture with the aid of Jeff Coppinger.

Jeff Coppinger served as President of Cherokee Rental, Inc., which operated an automobile leasing business in five locations in East Tennessee. Mr. Coppinger became acquainted with Mr. Atkins through a golf game, and Mr. Atkins sparked a deal between himself, his business partner, Mr. Martin, and his new golfing partner, Mr. Coppinger. In 1997, after the parties had already been conducting business together for a few years, the parties entered into a written agreement.

The business agreement is titled an "independent business agreement"; however, the agreement on its face describes an agency relationship. Mr. Coppinger worked for the benefit of BFM Leasing, and he required permission from BFM Leasing to perform regular business activities. Essentially, BFM Leasing funded the purchase of automobiles to satisfy leases procured by Mr. Coppinger. The leases and the cars were in the name of BFM Leasing, and BFM Leasing controlled when funding requests were granted for the purchase of vehicles.

BFM Leasing purchased residual automobile insurance policies for each leased vehicle. The insurance secured that the vehicle would not depreciate below an amount published in an agreed upon annual report. BFM Leasing purchased these policies from Philadelphia on a continual basis from 1996-2000. The policies stated the premiums were fully earned upon receipt and outlined the procedure for a proper tender under the policy. BFM Leasing ordered the policies based solely on the vehicle information provided by their agent, Mr. Coppinger.

At an undetermined point, Mr. Coppinger began forging leases and applications for certificates of title. After BFM Leasing provided funding for these phantom leases, Mr. Coppinger embezzled the funds without purchasing the vehicles. BFM Leasing continued to purchase insurance on the requested vehicles, unaware that the vehicles did not exist. BFM Leasing, which was run by two professional financial planners, bought insurance policies for non-existent cars with fabricated vehicle identification numbers.

In late November 1999, Mr. Atkins and Mr. Martin became suspicious because the certificates of title, for which Mr. Coppinger presented applications, had not been received from the State. BFM Leasing hired an accountant, Sharon Draper, to aid Mr. Coppinger in completing the necessary paperwork. On January 7, 2000, Mr. Coppinger confessed to his fraudulent scheme. BFM Leasing never uncovered Mr. Coppinger's fraud. It was Mr. Coppinger that confessed.

To date, BFM Leasing has been unable to determine when Mr. Coppinger began his embezzlement. To date, BFM Leasing has been unable to determine which automobiles were actually purchased of those Mr. Coppinger requested. Evidently, Mr. Coppinger gifted some vehicles to friends and acquaintances, and those vehicles are still being located. In attempts to collect some of their loses, BFM Leasing now blames Philadelphia for purchasing insurance policies in precise accord with BFM Leasing's requests.

ARGUMENT

BFM Leasing requests a full refund of the premiums paid for cars which have not been physically located. First, a refund is not proper if the cars actually exist. There is reason to believe, based on an investigator's report, that some of those cars may exist, but Mr. Coppinger disposed of them without

a traceable lease. Second, the insurance policy stated the premiums were fully earned upon receipt and non-refundable. BFM Leasing requested the insurance and enjoyed the benefit of some of those policies for almost three years. Now, BFM Leasing wants a refund because BFM gave them what they asked for. Lastly, BFM Leasing cannot shield itself from the fraud of their own agent by claiming a mutual mistake occurred. Mr. Coppinger was acting as the agent of BFM Leasing; therefore, Mr. Coppinger's knowledge is imputed to BFM Leasing. There was no mutual mistake because BFM Leasing knew, through their agent's knowledge, that the cars did not exist at the time the policies were issued.

In the alternative, BFM Leasing requests Philadelphia pay policy benefits for the outstanding claims. The policy states a loss claim must be completed within 30 days after the scheduled termination date. An appropriate tender under the policy must include a copy of the title, a copy of the relevant lease document, and the factory invoice. BFM Leasing has failed to make a proper tender on any of the vehicles, and most incomplete tenders were not made within 30 days from the scheduled termination date. Mr. Martin himself admits a proper tender under the policy is "impossible."

Now, Defendant, Philadelphia, files this Memorandum of Law in Support of their Motion for Summary Judgment with the attached Statement of Undisputed facts. The undisputed facts show BFM Leasing has failed to state a claim upon which relief can be granted; therefore, Philadelphia is entitled to judgment as a matter of law.

A. STANDARD FOR SUMMARY JUDGMENT

A moving party is entitled to summary judgment when it establishes from the pleadings, depositions, interrogatories and admissions on file, together with

affidavits, if any, that no genuine issues of material fact remain to be tried, and that the undisputed facts entitle the moving party to judgment as a matter of law. Fed. R. Civ. P. 56; *White v. Lawrence*, 975 S.W.2d 525 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Summary judgment is appropriate when a necessary element of a claim has been negated. *Byrd*, 847 S.W.2d at 211. When only one conclusion can be drawn from the undisputed facts, the movant is entitled to summary judgment as a matter of law. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

B. FULLY EARNED AND NON-REFUNDABLE PREMIUM

Plaintiffs allege a contract was never formed because of a mutual mistake between the parties. BFM Leasing claims it lacked knowledge that the vehicles did not exist at the time the policies were issued. Certainly, Philadelphia had no knowledge of Mr. Coppinger's fraud, so Philadelphia presumed the vehicles existed. Nonetheless, BFM Leasing is imputed the knowledge of its agent, Mr. Coppinger, who knew from the inception that certain vehicles did not exist. Therefore, the mistake in creating the policies was not mutual, but very one-sided.

1. AGENCY

An agency relationship arises when there is benefit and control. First, an agent carries on business for the benefit of a principal. *See Jack Daniel Distillery, Lem Motlow Prop. v. Jackson*, 740 S.W.2d 413, 416 (Tenn. 1987); *Gehl Corp. v. Johnson*, 991 S.W.2d 246 (Tenn. Ct. App. 1998); *Nidiffer v. Clinchfield R. Co.*, 600 S.W.2d 242, 245 (Tenn. Ct. App. 1987). Second, a principal holds the ability to exercise control over the agent. When an agency relationship is created, an agent's knowledge is generally imputed to the principal.

Jeff Coppinger operated a car leasing business under the name Cherokee Rental, Inc. BFM Leasing and LandOak Leasing entered into an agreement with Mr. Coppinger, whereby Mr. Coppinger would procure leases for in the name of BFM Leasing. Mr. Coppinger would purchase cars to satisfy the needs of the leases through funds on loan from BFM Leasing. For each purchase, Mr. Coppinger submitted a funding request for BFM Leasing's approval. The leases Mr. Coppinger made were in the name of BFM Leasing, and the cars purchased by Mr. Coppinger were titled to BFM Leasing.

Jeff Coppinger acted for the benefit of BFM Leasing by procuring leases in BFM Leasing's name and purchasing vehicles registered to BFM Leasing. BFM Leasing not only had the ability to control Mr. Coppinger, but exercised that ability by approving funding requests. Mr. Coppinger could not receive funding until he supplied BFM Leasing with a factory invoice, application for title, and a signed lease. Mr. Coppinger updated BFM Leasing on at least a weekly basis of the business affairs. BFM Leasing even hired an assistant, who was paid by BFM Leasing, to work directly for Mr. Coppinger.

2. IMPUTED KNOWLEDGE

An agent's knowledge is generally imputed to the principal. *Griffith Motors, Inc. v. C.E. Parker*, 633 S.W.2d 319, 322 (Tenn. Ct. App. 1982); *American General Life Ins. Co. v. Gilbert*, 595 S.W.2d 83, 87 (Tenn. Ct. App. 1979). An exception to the imputed knowledge rule is often called the adverse interest exception. An agent's knowledge is not imputed to the principal when "circumstances plainly indicate] that the agent would not advise his principal, as where the agent is known to be acting adversely to the principal, or where the third person seeking to charge the principal is in collusion with the agent." *DeFord v. National Life & Accident Ins. Co.*, 185

S.W.2d 617, 620 (Tenn. 1945). A limitation to the adverse interest exception occurs "when the agent is acting as the sole representative of the principal in the transaction in question." *Bland v. Allstate Ins. Co.*, 944 S.W.2d 372 (Tenn. Ct. App. 1997) (*citing Griffith Motors*, 633 S .W.2d at 322); *State v. Candler*, 728 S .W.2d 756, 759 (Tenn. Ct. App. 1986)).

Mr. Martin states that Mr. Coppinger was the only person he worked with regarding BFM Leasing's transactions. Mr. Coppinger is clearly the sole representative of BFM Leasing. No other person had the authority to enter into leases on behalf of BFM Leasing, except the principals, Mr. Atkins and Mr. Martin. BFM Leasing relied solely on the figures provided to them by Mr. Coppinger to determine which vehicles needed residual insurance policies. Therefore, under the sole actor doctrine, Mr. Coppinger's knowledge is imputed to his principals, Mr. Atkins and Mr. Martin. Based on the theory of imputed knowledge, BFM Leasing, as a matter of law, cannot defend the formation of the contract based on mutual mistake.

C. IMPROPER TENDER

The policy clearly states the applicable procedure for making a proper tender. In his deposition, Mr. Martin, on behalf of BFM Leasing admitted that a proper tender would be "impossible." Plaintiffs attempt to claim substantial compliance by submitting late, incomplete tenders. Substantial compliance is an equity principle, which is intended to remedy harsh injustice. In this case, substantial compliance is not appropriate. The documents required for tender are not unduly burdensome, and the time period allowed for tender is reasonable. In fact, the only reason BFM Leasing has not fully complied with the policy requirements is because it is "impossible" for them to do so. A proper tender is "impossible" because of the fraud of BFM Leasing's agent,

not because of any misfeasance on Philadelphia's part. Philadelphia only did exactly what BFM Leasing asked of them, and now, BFM Leasing wants to punish Philadelphia for providing the insurance it requested. BFM Leasing cannot comply with tender requirements; therefore, policy benefits are completely inappropriate.

CONCLUSION

Plaintiffs bought insurance to secure the risk of depreciation on certain automobiles. Defendant did not insure Plaintiffs' business practices. BFM Leasing is operated by two astute businessmen. Both men have distinguished credentials in the field of financial planning and are fully capable of understanding the simple business concepts involved in residual insurance policies. Plaintiffs understood the term "fully earned premium." Plaintiffs understood the procedure for making a "proper tender" under the policy. Most importantly, Plaintiffs understood that Philadelphia was insuring the cars, not insuring against the fraud of their agent or Plaintiffs' own errors and omissions.

This 1st day of July, 2003

Respectfully submitted,

BUSSART & MEDLEY

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of July, 2003, mailed by United States mail with first-class postage prepaid, a true and accurate copy of the foregoing to **Brian C. Quist, Esq.**, Jenkins & Jenkins Attorneys, PLLC, 2121 First Tennessee Plaza, 800 S. Gay Street, Knoxville, TN 37929-2121.

Lee Bussart Bowles
LEE BUSSART BOWLES

Supreme Court, U.S.
FILED
SEP 7 - 2005
OFFICE OF THE CLERK

(2)

No. 05-52

IN THE

Supreme Court of the United States

BFM LEASING COMPANY, LLC,

Petitioner,

v.

PHILADELPHIA INDEMNITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Philadelphia Indemnity, has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF THE CASE

Petitioners set forth a satisfactory statement of the case with the exceptions addressed below.

Petitioners state the "one issue raised by Philadelphia pertaining to Count I" was the imputed knowledge theory. In fact, Philadelphia's motion for summary judgment was broader than Petitioner's characterization. Petitioner's Complaint asked for rescission of the contract due to a mutual mistake. Philadelphia contended that the contracts were enforceable, and the theory of mutual mistake did not void the contracts. Namely, Philadelphia contended the mistake was one sided, not mutual. App. at 37. Philadelphia argued that the knowledge of Mr. Coppinger, as the agent of BFM Leasing and Landoak, should be imputed to the company. Therefore, the contract was not voidable for a mutual mistake.

While it is true that Philadelphia's motion focused on the imputed knowledge theory, the motion asked the Court to determine as a matter of law whether mutual mistake voided the contract. The motion for summary judgment asked that the insurance contracts be deemed enforceable because, as a matter of law, the mutual mistake theory would not apply. The Court chose not to rely on Philadelphia's imputed knowledge argument. Still, the Court found that Plaintiff's theory of mutual mistake lacked merit, and the contracts were fully enforceable.

The Court stated that the theory of mutual mistake was not applicable because the "contract as not at variance with the mutual intention of the parties." App. at 6. The Court noted that a contract may be voided for a mutual mistake regarding present or past fact, which is material to the contract. A contract may not be voided for a mistake arising from future acts. Therefore, the Court found that the contracts were enforceable. Ultimately,

the Court granted Defendant's motion for summary judgment because the theory of mutual mistake was inapplicable to the circumstances.

Petitioners allege that the imputed knowledge theory was the single issue raised in the motion for summary judgment. To be more accurate, the imputed knowledge theory supported Philadelphia's assertion that mutual mistake did not void the contracts. The Court agreed with Philadelphia's assertion for a different reason.

The motion for summary judgment argued that the undisputed facts failed to state a claim upon which relief could be granted. The master agreement between the parties unequivocally stated that the premiums were non-refundable and fully earned upon receipt. The Court found that the Plaintiff's allegation of mutual mistake had no merit as a matter of law, and granted summary judgment based on the plain language of the contract.

REASONS FOR DENYING THE PETITION

First, the Court did not dismiss the case *sua sponte*. The issue was before the Court due to Philadelphia's motion for summary judgment. Both parties had an opportunity to brief the issue and make oral argument to the Court. Second, even if the Court's action is deemed *sua sponte*, BFM Leasing was not prejudiced by the Court's action. In any event, there is no basis for the involvement of this Court.

A. Dismissal Was In Response To Philadelphia's Motion For Summary Judgment, Not *Sua Sponte*

Petitioners allege that the summary judgment was granted *sua sponte*. The definition of *sua sponte* is "without prompting

or suggestion; on its own motion. Black's Law Dictionary, Seventh Edition. Philadelphia filed a motion for summary judgment as to both counts of Petitioner's Complaint. App. at 31-41. BFM Leasing filed a response. Both parties appeared before Judge Phillips and argued the matter. The granting of summary judgment against BFM Leasing was not *sua sponte*. BFM Leasing was given notice of the motion and had ample opportunity to address their position with the Court. The trial court was not acting on its own motion. The court adopted its own reasoning, but the trial court simply adjudicated a matter properly before it.

Philadelphia made the broad assertion that the contracts were enforceable because mutual mistake did not apply. Philadelphia alleged that mutual mistake did not apply because of imputed knowledge, and the Court rejected this argument. The Court agreed, however, with Philadelphia's assertion that mutual mistake did not void the contracts at issue. Therefore, the Court, relying on a different reasoning than that presented by Philadelphia, found that mutual mistake did not void the contract. The Court also agreed that the Petitioners were incapable of making a proper tender under the terms of the contract. Without a proper tender, Petitioners' claim for benefits under the policy was also without merit.

Petitioners were, of course, provided notice of the summary judgment. Motions were filed and both counsel presented argument to the Court. The issue presented in Philadelphia's Motion for Summary Judgement was whether mutual mistake voided the contract. BFM Leasing was notified and responded. No where in Petitioners' response to the trial court did Petitioners ever allege their uninsurable interest defense.

B. If *Sua Sponte*, Petitioners Still Suffered No Prejudice

For the first time on appeal, Petitioners address the uninsurable interest argument. In summary, Petitioners allege that the contracts are void, not because of mutual mistake as averred in the pleadings, but because insurance policies are prohibited when there is no insurable interest.

First, the facts are undisputed that Petitioners are unable to determine which vehicles actually existed. The private investigator's report shows that Mr. Coppinger, the manager of BFM Leasing, mismanaged the fleet. Numerous cars were lent to various and sundry characters without proper documentation. Based on the facts, it is impossible to know which cars actually existed and which cars only existed on paper. So, it is impossible to determine which, if any, of the contracts were void for lack of an insurable interest.

Second, all of the residual value insurance contracts had an insurable interest. The Sixth Circuit addressed the distinction between the *Vinson* case cited by the Petitioners and the case at bar. In the case at hand, the thing to be insured was a contingent event, not an actual piece of property. App. at 21. It is not required that the insured be certain of sustaining economic injury from the loss of the property. The concept of an insurable interest is quite broad. A person holds an insurable interest "if by its continued existence he will gain an advantage, or if by its damage or destruction he will suffer a loss, whether or not he has any title in, lien upon or possession of the property." *Cherokee Foundries v. Imperial Assur. Co.*, 188 Tenn. 349, 219 S.W.2d 203 (1949). BFM Leasing had an insurable interest in all the vehicles because they had purchased residual value insurance. Petitioners would profit or suffer a loss regardless.

Even if the Court's granting of Philadelphia's summary judgment is considered *sua sponte*, the fact remains that Petitioners were not prejudiced by the Court's decision. Without evidence of prejudice, there is no error in granting summary judgment *sua sponte*. The Sixth Circuit stated that BFM and Landoak's interest was sufficient to be determined an insurable interest. Therefore, Petitioners suffered no prejudice by neglecting to argue this theory to the trial court.

CONCLUSION

Even the dissenting opinion from the Sixth Circuit acknowledged that 'sound policy may suggest that his cost should be borne by the insured, by allowing the insurance company to keep the premiums, since the insured is in a better position than the insurance company to know whether the risk is attached." App. At 28. This case is simply about Petitioners wanting their residual value insurance to protect them from the fraud of their own employee.

Respectfully submitted,

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